

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPH WILLIAM DROPALSKI,

Petitioner,

v.

BELINDA STEWART,

Respondent.

Case No. C06-5697 FDB/KLS

ORDER DENYING
PETITIONER'S MOTION
TO STAY

This habeas corpus action has been referred to United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Petitioner filed this action under 28 U.S.C. § 2254, challenging his 2002 convictions. (Dkt. # 5). Before the Court is Petitioner's motion to stay or hold his petition in abeyance (Dkt. # 15). Having reviewed Petitioner's motion, Respondent's response (Dkt. # 16), Petitioner's reply (Dkt. # 17), and the balance of the record, the Court finds that the motion should be denied.

I. DISCUSSION

Petitioner requests that this Court stay or hold his petition for habeas corpus in abeyance while he returns to the Washington state courts to re-argue his case based on *Blakely v. Washington*, 542 U.S. 296 (2004), *Cunningham v. California*, 127 S.Ct. 856 (2007) and *State v.*

1 *Pillatos*, 2007 WL 178188 (Wash.). Petitioner does not claim that these cases state a change in the
2 law, but that they restate the rule previously announced in *Apprendi v. NJ*, 530 U.S. 466 (2000).
3 Petitioner claims that *Apprendi*, which applied to him, held any sentencing scheme unconstitutional
4 insofar as it increased the penalty beyond the statutory maximum as to any fact not found by a jury
5 and proven beyond a reasonable doubt. (Dkt. # 17 at 2). Thus, Petitioner argues, *Apprendi*'s
6 progeny, including *Blakely*, *Cunningham*, and *Pillatos*, merely restated the law as already announced
7 by the Supreme Court in *Apprendi*. (*Id.*).

8 Respondent argues that neither *Pillatos* nor *Cunningham* are significant changes in the law,
9 which would excuse an untimely filing under RCW 10.73.100, of the second personal restraint
10 petition that Petitioner proposes to file in state court. In addition, Respondent argues that *Blakely*
11 does not apply retroactively to decisions that became final prior to its publication.

12 Despite Petitioner's interpretation of *Apprendi*, the cases upon which he relies have not been
13 made retroactive to his conviction. In *Pillatos*, the Washington Supreme Court held that the State
14 can seek exceptional sentences under the new 2005 Washington sentencing statute for defendants
15 who pled guilty after the statute was enacted, but not for those who pled guilty before it was
16 enacted. Petitioner pled guilty in 2002. Therefore, Petitioner cannot now collaterally challenge his
17 conviction based on *Pillatos*.

18 In *Cunningham*, the Supreme Court held California's determinate sentencing law that gave
19 the judge, not the jury, authority to find facts that exposed defendant to an elevated sentence violated
20 his right to trial by jury. *Id.* at 860. There is no indication the Supreme Court made *Cunningham*
21 retroactive to cases that were final prior to its publication.

22 The Ninth Circuit has made it clear that the Supreme Court's decision in *Blakely* does not
23 apply retroactively to convictions that became final prior to its publication. *Schardt v. Payne*, 414
24 F.3d 1025 (9th Cir. 2005) The Court also noted that the Supreme Court "has not made *Blakely*
25 retroactive to cases on collateral review." *Cook v. United States*, 386 F.3d 949 (9th Cir. 2004).
26 Petitioner's conviction became final on February 3, 2004. (Dkt. # 14, Exh. 7). Under *Schardt* and
27 *Cook*, the *Blakely* decision, decided in June 2004, does not retroactively apply to Petitioner's case.
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2 Accordingly, the Court find no basis for granting a stay and Petitioner's motion (Dkt. # 15)
3 shall be **DENIED**.

4 Dated this 27th day of March, 2007.
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8 Karen L. Strombom
9 United States Magistrate Judge
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